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Van Benschoten, William Henry

Subrogation

New York

1916

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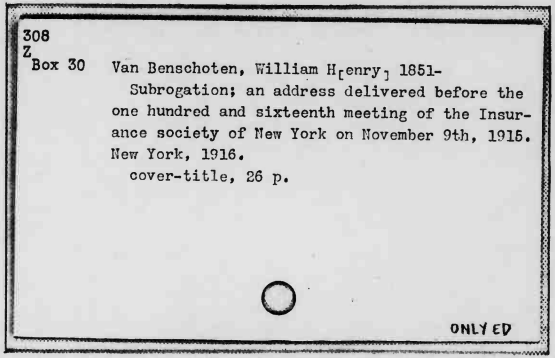

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Box 30 Van Benschoten, William H[enry] 1851-
Subrogation; an address delivered before the one hundred and sixteenth meeting of the Insurance society of New York on November 9th, 1915. New York, 1916.
cover-title, 26 p.

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SUBROGATION

AN ADDRESS

Delivered before the One Hundred and Sixteenth Meeting

OF

The Insurance Society of New York

ON

November 9th, 1915

BY

Mr. William H. Van Benschoten

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Mr. Chairman and Gentlemen:

I consider it no small honor to have been invited to address you upon a subject of interest to your Society.

In view of the very wide experience of so many of your members, and of the ability and energy always displayed by you all in the conduct of your work, it is with considerable hesitation that I accept the invitation and venture to-day to address you upon the subject assigned me by your committee.

It is sometimes possible for one who stands without the veil, but who is called upon occasionally to look within the sacred circle, to throw out a suggestion or call attention to some proposition by the very reason of his position, which may be helpful to those within the veil who have a much wider knowledge and experience with relation to the subject under discussion. It is with this idea, rather than with the thought that I will be particularly instructive to an assembly so efficient in solving all the problems of insurance, that I will address you on my subject "Subrogation—and the Effect of a Waiver of Subrogation Rights."

Subrogation is the substitution of another person in the place of one creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another whether as creditor or as the possessor of any other rightful claim. The Court of Appeals of the State of New York has defined "subrogation" as the

> "mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it."
>
> (Arnold v. Green, 116 N. Y. 566).

There are two kinds of subrogation, legal and conventional. Legal subrogation arises when by operation of law a third person becomes equitably entitled to stand in the place of the creditor. This kind of subrogation is sometimes known as the common law right of subrogation and it grows out of the doctrine of indemnity and also finds an equitable basis in the consideration that the person who caused the loss or who is primarily liable ought to be made ultimately responsible for the damages sustained. It is equitable and just that the burden of the loss

ought ultimately to rest upon the party who caused it. (Conn. Mut. Life Ins. Co. v. Cornwell, 72 Hun., 199).

It should be remembered, however, that legal subrogation is allowed only in cases where the person paying the debt—in the case of insurance, the loss—is under legal obligation or liability to do so. (Authorities cited in Durante v. Eannaco, 65 N. Y. App. Div. 435).

The Supreme Court of the United States in the case of Aetna Life Insurance Company v. Middleport, 124 U. S., 534, approved the statement of one of the Chancellors of South Carolina made with reference to this question, and which was as follows:

> "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts, will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of such order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty* * *. But I have seen no case, and none has been referred to in the argument, in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

The word "stranger" as used in this connection, is not necessarily one who has nothing to do with the transaction out of which the debt grew; any one being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer. (Arnold v. Green, 116 N. Y. 566; Luppnier v. Garrels, 20 Ill. App. 625).

In passing we should perhaps say that payments made in ignorance of the real state of facts, have been held not to be voluntary (Durante v. Eannaco, 65 N. Y. A. D., 435) and a person who has paid a debt under a colorable obligation to do so that he might protect his own claim or under an honest belief that he is bound to, has been held entitled to be subrogated; (Muir v. Berkshire, 52 Ind. 149), and a person who mistakenly, but in good faith, believes that he has an interest in property, to protect which he discharges a lien is subrogated to the lien

for his repayment. (Fowler v. Parsons, 143 Mass. 401; Cockrun v. West, 122 Ind. 372). There are, of course, other instances of like nature. These exceptions are properly recognized by the Courts in order that so far as is possible equity may always be done.

The United States Supreme Court, in referring to legal subrogation, has said:

> "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured. In a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation, but the rights of the assured, and if the assured has no right of action none passes to the insurer."
>
> St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S., 223, 235.)

Conventional subrogation occurs when the creditor formally transfers his claim to a third person and arises from express or implied contract between the payer and the debtor or creditor that the payer shall be subrogated, rather than, as is the case in legal subrogation, from the automatic operation of a rule of law upon a given set of circumstances. Conventional subrogation or subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes, and, furthermore, can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor. (Conn. Mut. Life Ins. Co. v. Cornwell, 72 Hun., 199).

The right of subrogation exists where the recovery is claimed solely by virtue of a statute imposing a liability just the same as though the loss was occasioned by the negligence or wrongdoing of another.

In the case of Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co., 68 Pacific Reporter, 670, (decided in the Court of Appeals of Colorado), an action was brought against the de-

fendant railroad by the insurer under a statute of the State of Colorado providing as follows:

> "Every railroad corporation operating its line of railroad or any part thereof shall be liable for all damages by fire that is set or caused by operating its line or any part thereof and such damages may be recovered by the party damaged by proper action in any court of competent jurisdiction."

The fire had by the Lumber Company, the insured, was caused by the railroad. It was claimed that the Insurance Company could not be subrogated to the owner's rights in an action where a recovery is claimed solely by virtue of the statute. The court, in holding that this contention was not sound, said:

> "We do not understand counsel to challenge this right of subrogation where the loss was occasioned by the negligence or wrongdoing of another, and the common-law remedy is sought to be enforced. In such case we believe the right to be very generally, if not universally, recognized. 2 May, Ins. Sec. 454; 2 Bid. Ins. Sec. 1280 et seq.; Harris, Subr. Sec. 606; Sheldon, Subr. Secs. 11-230. It has also been held in many adjudicated cases that this right of subrogation exists whether the fire is caused by negligence or accidentally, within statutes imposing a liability in any event, —which directly covers the case at bar. See 2 Bid. Ins. Sec. 1281, and cases cited; Hart v. Railroad Corp., 13 Metc. (Mass.) 100, 46 Am. Dec. 719 * * *. In all cases the right of subrogation is based upon the doctrine that the contract of insurance is treated as an indemnity, and the insurer, as a surety, is entitled to all the remedies and securities of the assured, and to stand in his place, or upon doctrines of a similar equitable character. 2 May, Ins. Sec. 454; Harris. Subr. Sec. 13 et seq. This being true, we see no reason why the right of subrogation should be denied in the one instance any more than the other, unless because of some prohibitory statute, or unless, perhaps, in the absence of any contract for subrogation, the facts might be such as to negative the existence of any equities in behalf of the insurer. None of such possible exceptions, however, apply to this case."

From these definitions it is evident that both legal and conventional subrogation may exist between the same parties at the same time. Sometimes where there is legal subrogation, there also exists, by reason of an express agreement between the parties, conventional subrogation, but frequently there exists conventional subrogation when there is no right to legal subrogation. This is the case when a party being under no legal obligation or liability to pay the debt or loss, pays the same and is subrogated

because of the provisions of an express agreement between the parties, and not because of the operation of a rule of law.

It has been held that the right of subrogation will not be allowed one who would thereby reap advantage in any way from his own wrongdoing, nor to relieve a party from the consequences of his own unlawful act, nor where it would be contrary to public policy, and that as its purpose is only to prevent fraud or subserve justice, it will not be applied where its exercise would promote injustice, and thus can be applied only with a due regard to the legal and equitable rights of others. (German Bank v. United States, 148 U. S., 573; Rowley v. Towsley, 53 Mich., 329; Johnson v. Moore, 33 Kan., 90; Platt v. Brick, 35 Hun., 121; Drake v. Paige, 52 Hun., 292.)

It has also been held that the right of subrogation cannot be defeated because the policy might have been successfully contested by the insurer nor because the insurance company had not complied with statutory requirements; (St. L. A. & P. R. Co. v. Fire Ass'n., 28 L. R. A. 83 (Ark.) 13; Phoenix Insurance Co. v. Penn Co., 134 Ind. 215); nor because the risk was negligently assumed by the insurer. (U. S. Cas. Co. v. Eagley, 55 L. R. A., 616 (Mich.), nor because the insurer is a member of a trust or combination in violation of statute. (Freed v. Am. F. Ins. Co., 43 So. 947 (Miss.)

As subrogation, especially legal subrogation, is the application of equity, its enforcement depends to a considerable degree upon the facts and circumstances of each particular case, and on the principles of natural justice.

In Drake v. Paige, 52 Hun., 302, the Court said:

> "The right of subrogation is an equitable one and its application must depend upon the circumstances of each particular case."

This proposition is probably somewhat limited where the right of subrogation arises under contract and is conventional subrogation.

Lines 102 to 105 of the Standard Fire Insurance Policy of New York, are as follows:

> "If this Company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment."

It will be noted that this clause in the Standard policy is

only applicable when the Company claims that the fire was caused by the act or neglect of some third party. In order for the insurer to have any benefit under this clause, there must be some third party responsible for the fire and who is liable to the insured for the damages suffered thereby. In such case, such party is primarily liable to the insured and it is the right of recovery which the insured has against such party under such circumstances that this clause of the Standard policy refers to.

If the policy did not contain this clause, the Company would still have the right of subrogation under the circumstances stated. It might not be able to require the assured to give the actual assignment as provided, and the provision that the assured shall make an assignment has been held to protect the insurer from having the assured destroy its right of subrogation, as will be hereafter referred to. (Carstairs v. Mechanics &c. Ins. Co., 18 Fed. Rep., 473; Jackson v. Boylston Mut. Ins. Co., 139 Mass. 508).

It is well settled that before there can be any right of subrogation, the insured must be fully indemnified for the loss to his property; that is, the Insurance Company must have fully indemnified the insured, before it can claim the right to be subrogated either at common law or under the policy provision above referred to.

When the insured has been fully indemnified, subrogation passes all the insured's rights, privileges and remedies against the party primarily liable to the insurer. In other words, the insurer stands in the shoes of the insured. It can be subrogated to and have no greater rights than those which the insured had. If the latter had no rights, the insurer as subrogee can have none, and under the above provision, the insurer having received an assignment from the insured, would be entitled only to the rights, privileges and remedies which the insured had and could only recover the amount paid by the insurer to the insured.

Some of the more common instances where subrogation arises, which are of interest to insurers, are where goods are burned while being transported by a carrier, or where a mortgagee has taken out insurance to protect his mortgage, or where, through the negligence of a third party, the property of the insured has been burned, or where by the order of some governmental authority, property has been destroyed for the public good.

In the case of Phœnix Insurance Co. v. Erie Transportation Company, 117 U. S., 312, the plaintiff insured grain on a boat

of the defendant, which vessel was afterward destroyed and the grain damaged. The plaintiff paid the insurance to the owners of the grain and then brought action against the defendant on the ground that it was subrogated to the rights of the owners of the grain against the defendant carrier. The bill of lading which the defendant transportation company gave to the insured (shipper), provided that the carrier should not be liable for loss or damage of the goods by fire, collision, etc., and further provided that the carrier when liable for the loss, should have the full benefit of any insurance that may have been effected on the goods.

The policy of insurance contained no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In this respect the case differs from an action brought under the standard policy. The Court held that while the loss had been incurred by reason of the negligence of the defendant carrier, that the provision in the bill of lading which provided that if the carrier was liable for the loss, it should have the full benefit of any insurance that may have been effected on the goods, limited the right of subrogation, and prevented the insurance company from recovering as against the carrier.

The Court, in discussing the nature of the right to be subrogated, said:

> "That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in the right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him.
>
> "The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.
>
> "For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the

owner of both ships, could not sue himself. Simpson v. Thomson, above cited; Globe Ins. Co. v. Sherlock, 25 Ohio, St. 50, 68.

"Upon the same principle, any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire; (York Co. v. Central Railroad, 3 Wall. 107); or requires claims against the carrier to be made within three months; (Express Co. v. Caldwell, 21 Wall. 264); or fixes the value for which the carrier shall be responsible; (Hart v. Pennsylvania Railroad, 112 U. S. 331). So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in Mobile & Montgomery Railway v. Jurey, 111 S. E. 584."

The ruling of the Court would, undoubtedly, have been different in this case, had there been an express stipulation upon the subject in the policy, or had there been proof of fraudulent concealment or misrepresentation by the owner in obtaining the insurance.

Where there is no express stipulation upon the subject contained in the policy and no proof of fraudulent concealment or misrepresentation by the owner in securing the insurance, it is thus seen that the insurer's right to be subrogated may be defeated by an express contract between the owner and the carrier of the goods, that the carrier shall have the benefit of any insurance on them in case of loss. (Phœnix Ins. Co. v. Erie etc. Transportation Co., 117 U. S., 312; Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass., 508; Platt v. Richmond etc. R. Co., 108 N. Y., 358). This might not be so if the insurance was taken out after a bill of lading containing such a provision had been accepted, and the insured took out the insurance with knowledge that the bill of lading contained such a provision, especially if the insured knew that the insurer had different rates of premium, one of which was applicable to a policy covering goods where the bill of lading did not contain such a provision, and the other a higher rate in case the goods were carried under a bill of lading containing such a provision; or if there was any misrepresentation or fraudulent concealment on the part of the owner and

insurer as to the nature of his bill of lading in this respect, when procuring his insurance. (Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S., 312, and cases cited.)

However, where the contract of insurance contains an express stipulation that the insurer shall be subrogated to the owner's rights against the carrier such as is contained in the standard policy, the owner cannot defeat the insurer's right of subrogation by contract with the carrier without forfeiting his own rights under the contract of insurance and losing his right to look to the insurer for a payment of his loss. (Carstairs v. Mechanics' etc. Ins. Co., 18 Fed. Rep. 473; Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508).

In order that there may be no doubt whatsoever that the insured is bound to preserve the right of subrogation to the insurer, some policies contain a clause to the effect that any act or agreement by the assured tending to defeat subrogation shall void the insurance. It has been clearly and universally held by the Courts that if a policy contains such a clause and the owner contracts with the carrier that it shall have the benefit of any insurance on his goods in case of loss, that the owner violates his contract of insurance and cannot recover his loss against the insurer. Fayerweather v. Phœnix Ins. Co., 118 N. Y. 324; Inman v. So. Carolina R. Co., 129 U. S. 128).

While, however, this might cause the assured to lose his insurance, the Supreme Court of the United States has held that he would still retain his right of action against the carrier (Inman v. So. Carolina R. Co., 129 U. S. 128).

In a case in Minnesota where the shipper's insurance had become forfeited because he had violated the provision in the policy for subrogation by taking a bill of lading providing in case of loss any insurance should be for the benefit of the carrier, the insurer nevertheless voluntarily paid the loss to the insured, but upon express condition that they should have an unqualified right of resort over against the carrier, and the Court held that the carrier could not in defense avail itself of the clause in the bill of lading, inasmuch as the insured had invalidated the policy in accepting the bill of lading and hence there was no insurance existing upon which the clause in the bill of lading could operate. (Southerd v. Minn. Etc. R. Co., 60 Minn. 382).

In the case of Connecticut Fire Insurance Company v. Erie R. R. Co., 73 N. Y. 399, buildings which had been insured by the plaintiff were burned by fire caused by sparks or coals from

an engine of the defendant. The plaintiff, under a policy of insurance issued by it, paid the loss and was held to be entitled to subrogation as against the defendant, it having been found that there was negligence on the part of the defendant in causing the fire.

In the case of Excelsior Fire Insurance Co. v. Royal Insurance Co. of Liverpool, 55 N. Y. 343, it was held that when a mortgagee or one in like position toward property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss by fire happens, that he is not required to exhaust his remedy upon the mortgage before enforcing the policy and that the insurer must pay, although the property undestroyed is equal in value to the amount of the mortgage debt, but that upon making such payment the insurer is entitled to an assignment of the rights of the insured, and under the principle of subrogation is entitled to all his rights and remedies which the mortgagee had against the property under his mortgage.

It has also been held in many jurisdictions, where the mortgagee has taken out insurance as above stated, that even in the absence of an express provision to that effect in the policy, the insurer, upon paying the mortgagee the amount of the loss, becomes subrogated pro tanto to the mortgage security as against the mortgagor, but not so as to in any way impair the right of the mortgagee to collect his debt in full. (Ulster Co. Sav. Bk. v. Leake, 73 N. Y., 161).

In the case of Pentz and others v. The Receivers of the Aetna Fire Insurance Company, 3 Edwards Chancery Reports, 341, a loss arose from the destruction of certain stores and merchandise by gunpowder used by order of the Mayor and two aldermen of New York City to stop the ravages of fire. In consequence of the loss having been thus occasioned by the City authorities, the assured was entitled to recover from the City, which it did. The Aetna Fire Insurance Company, on account of the conflagration, which was the great fire in New York City, of 1835, became insolvent, and the assured made application to be allowed a dividend on account of his policy of insurance. The court denied the application, and in its opinion, said:

> "I think it can hardly admit of a doubt that whatever sum the underwriters may be compelled to pay upon their contract of insurance for a loss occasioned in such a way as to render the city liable, the corporation are liable to reimburse to the insurer."

The court based its decision upon the proposition that if the assured were allowed to recover against the insurer the amount would have to be credited upon the amount due to the assured from the City so that the City could turn a like amount over to the insurer. To prevent such a circuity, it denied the assured's application to be allowed to share in the dividend paid by the Receivers of the insurer.

An interesting case in the consideration of the subject of subrogation, is that of United States v. The American Tobacco Co., 166 U. S., 468. The American Tobacco Company had been paid by its insurers for a large loss by fire. Among the items of total loss as adjusted with the Company were several thousands of dollars worth of unused internal revenue stamps, the full value of which under the provisions of the United States Revised Statutes, were recoverable or redeemable by the Tobacco Company from the United States authorities. The insurers having paid the loss, claimed that they were subrogated to the rights and remedies of the insured for reimbursement from the Government under the terms of the Statute. An action was brought by the insurers in the name of the insured and a recovery had.

Under the provisions of the policy requiring the insured to make a formal assignment pro tanto of any rights or remedies that he may have against the party causing the fire, the Company may require an assignment as condition of payment, although such an assignment is not necessary to perfect the right of the company. (Niagara Ins. Co. v. Fidelity Co., 123 Pa. St., 516; Hamburg Bremen Fire Ins. Co. v. Atlantic Coast Line R. R. Co., 132 N. C., 75). It, however, enables the insurance company without any question to institute an action in its own name against the party primarily liable. Sometimes the loss exceeds the amount of the insurance, and in such cases the insured and the insurer may properly make an agreement to sue the party primarily liable for joint benefit. (Chicago R. R. Co. v. Pullman Car Co., 139 U. S., 79). The party primarily liable, who is sued for causing the loss, cannot defend on the ground that the insurer has paid the amount due under the policy to the insured, since the policy is *res inter alios acta.*

In the absence of express stipulation the rule of subrogation will not be applied to prevent the insured from receiving his full indemnity. This perhaps is better expressed in this way;—

Assuming that the insured, where the loss exceeded the amount of insurance, secured a judgment against the person

primarily liable for the loss, to wit: a wrongdoer, for the full amount of the loss, but by reason of the insolvency of the party is only able to collect a part of the judgment. He could then, in the absence of a stipulation, take to himself an amount equal to the difference between the amount of insurance he had received and his actual loss and pay the balance over to the insurers, although, of course, he would in no instance pay over an amount exceeding the sum which the insurer had paid to him. (Atch. etc. R. R. Co. v. Neet, 7 Kan. App. 495).

In the instance just cited had the rule of subrogation been fully applied and the insurer, under his right of subrogation, been entitled to recover from the wrongdoer an amount equal to the loss he had paid to the insured, the insured would not have been fully indemnified for his loss.

The Courts differ somewhat as to how far they will press the doctrine of indemnity and that of subrogation when applied to the law of insurance. The English courts, the United States Supreme Court and the courts of some of the states seem inclined to hold that the contract of insurance is one of strict indemnity and to be very liberal in construing the right of subrogation. The attitude of these courts is that a policy of fire insurance is a contract of indemnity and that upon paying the amount of the loss the insurer has the right to be put in the place of the assured, and if thereafter the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him. (Darrell v. Tibbitts, L. R. Q. B. Div. 560; Castellain v. Preston, L. R. 11 Q. B. Div. 380; Phœnix Assur. Co. v. Spooner, 2 K. B. 753; Chicago &c. R. Co. v. Pullman Car Co., 139 U. S. 79; Weber v. M. & E. R. Co. 35 N. J. L. 400; Packham v. German F. Ins. Co. 91 Md. 515).

In the case of Castellain v. Preston, supra, the insured made an executory contract to sell the premises insured under the policies, without mentioning anything about insurance. Before the contract was performed a loss by fire occurred and the insurance companies paid the loss to the vendor. Thereafter, as he was obligated to do under the English law, the vendee completed the purchase and paid the full purchase price to the vendor. Then the insurance company claimed the right to open its settlement with the insured and be paid back by him the whole amount of insurance paid. The lower court held that it could not, but

on appeal the Appellate Court held that the company was entitled to recover under the doctrine of subrogation or upon the theory that the contract of fire insurance was one of strict indemnity.

The Court in giving the English construction of the right of subrogation said:

> "Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

In the case of Darrell v. Tibbitts, supra, the landlord had insurance covering injury by explosion, and also had a lease with a tenant containing a covenant to make repairs. The property was damaged by an explosion. This covenant covered the making of the necessary repairs required because of this explosion and the damage was also covered by the insurance policy. The insurance company paid to the landlord £750, the amount of the loss. Thereafter the tenant made the repairs. The insurance company then brought an action against the landlord to recover back the £750, and obtained judgment for that amount. It should, perhaps, be noted that the explosion was caused by the negligence of a Gas Company, which paid the tenant damages. The Court in its opinion, said:

> "The question now arises whether the insurance company who paid the money to the landlord at a time when they were obliged to pay by virtue of their contract, can recover it back because the tenants have done that which they could not avoid doing; if they had not repaired, they must have paid damages to the landlord. If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would be not merely indemnified, he would be paid twice over."

Also in this case, the court stated as follows:

> "It was argued on behalf of the defendant that as regards the rights of insurers, a distinction exists between a case where the assured has a remedy against a tortfeasor in respect of the damage covered by the policy, and a case where the assured has a right by contract with some third person, to be indemnified in respect of that same loss. I am by no means prepared to say that there may not be some contracts so entirely independent of the subject-matter of the insurance, as to put the assured in the position of being more than indemnified in the event of a loss. But I am clearly of opinion as a matter of principle, that where the contract of insurance and the contract with the third party cover identically the same subject-matter, the assured has no right to more than an indemnity."

These cases and others which have followed them, seem to lay down the rule that the assured could never have but one reimbursement for his loss, that is, he could not be the gainer by reason of the loss, and if the assured was entitled to receive anything from any third person, which would in any way tend to diminish his loss or to compensate him for it, that the insurance company would be entitled either to be subrogated to his right to recover such compensation or to receive it from him directly or by credit on the amount of insurance, if he had already recovered it.

This must, of course, necessarily follow if a policy of insurance is to be held strictly and absolutely a contract of indemnity.

In some of the other states, however, including the State of New York, it has been held that this rule will not be enforced to such an extent and that where the assured has, under contract, a claim against a third party, who was not connected with the loss or responsible for it, that the insurer cannot, upon payment of the loss, be subrogated so as to recover from the third party. (Michael v. Prussian Nat. Ins. Co. 171 N. Y. 25; Foley v. Mfgrs. F. Ins. Co., 152 N. Y. 131; Continental Ins. Co. v. Aetna Ins. Co., 38 N. Y. 16; International Trust Co. v. Boardman, 149 Mass., 158; Heller v. Royal Ins. Co. 177 Pa. State, 262, 34 L. R. A., 600.)

This line of cases seems to follow the rule that a contract of insurance is not strictly a contract of indemnity and that it is only in instances where the loss sustained has been caused by the act or neglect of some third party, which makes such third party primarily liable, that the insurance company has the right of subrogation or is entitled to be credited with the amount received by the insured from such third party. They do not recognize the right of the underwriter to be subrogated to contract rights belonging to the insured against third parties, unless there is some express stipulation to that effect, except perhaps sometimes in the case of a mortgagee.

Richards in his work on Insurance, has referred to this question as follows: (3rd Ed., §54):

> "For instance, the insured has two contracts both for value paid, both intended to protect from the same loss, or tending to accomplish that result, one of these contracts with an insurance company, the other with a third party. Why, under the doctrine of subrogation, should the loss fall upon the third party, while the insurance company, though retaining its premiums, goes free? Why should the insurance company be subrogated to rights against the third party rather than the third party to the insurance?"

Many of the courts of this country, including those in the states last referred to, seem disposed to construe a contract of insurance upon property, if otherwise valid, as an absolute promise by the assurer, according to the terms of the policy, to pay the loss sustained, and it is urged that inasmuch as premiums are fixed upon that measure of liability it would be inequitable in principle to follow any other basis of indemnity. On the other hand, the English courts have felt that it might be against public policy to permit an insured to receive any more than just his indemnity under any circumstances.

In this connection, we should note the case of Michael v. Prussian National Insurance Company, 171 N. Y. 25. In that case the defendant issued a policy of insurance to the Buffalo Elevating Company on the use and occupancy of their property and elevator building with boiler and houses attached* * * in Buffalo, New York, and known as the Dakota Elevator. At the time the policy was issued the Buffalo Elevating Company was a member of an association under an agreement, which agreement was renewed after the policy was issued, by which during the season of navigation percentages earned went in a general fund created by pooling common earnings of the members of the association, and they were to be paid over under all conditions and notwithstanding that the elevator might be destroyed and the general fund diminished in consequence. In other words, by an agreement between the members of the association, the Buffalo Elevating Company was to receive its percentage of the

profits, no matter if its elevator which was to be used under the pooling arrangement in earning the profits which constituted the general fund, was destroyed meanwhile by fire. The percentage which was to go to the Buffalo Elevating Company did not depend upon the remaining in existence of the elevator. The elevators were burned and destroyed, but not by reason of the act of the association or its members. The defendant insurance company claimed to be entitled by application of the equitable doctrines of subrogation to be credited with a proportionate share of the percentages or moneys received by the plaintiff from the association in reduction of its liability upon the policy. The Court held that this contention was untenable, Justice Gray in his opinion, saying:

> "How the appellant (defendant insurance company) can be heard to claim the application of the doctrine of subrogation, it is difficult to perceive. It has, certainly, not paid the loss, and the loss was not one which was to be made good as such by the association. * * * The theory of the right of subrogation rests upon the fact that the assured has a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff; who did not receive his payment from the 'pooling' fund because, or in consideration, of the loss, but under an arrangement, which had secured to members of the association certain percentages, under all conditions, as a consideration of entering into it."

This case followed as an authority the well known case of Foley v. Manufacturers Fire Insurance Company, 152 N. Y. 131. In that case, certain houses were being constructed under a contract between certain contractors and the plaintiff, by which the contractors were to furnish materials and build the houses, and to complete them by a time specified for a fixed sum to be paid defendant ten days after their completion. The owner took out an insurance policy upon the buildings. The fire occurred before the completion of the buildings, and it was admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or material supplied up to the time of the fire.

The defendant insurance company contended that as the plaintiffs had not been put to any loss because they would not have to pay anything to the contractors until the buildings were completed, that it should be relieved on its policy. The Court, however, said:

> "The defendants neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.
>
> "The fact that improvements on land may have cost the owner nothing or, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resorting to a contract liability of a third person, in no way affects the liability of an insurer in the absence of any exemption in the policy."

The reasons for holding that an insurance policy is not a contract of strict indemnity, are set forth clearly and somewhat at length in the case of King v. The State Mutual Fire Insurance Co., 61 Mass. (7 Cushing) 1. In that case a mortgagee at his own expense had insured his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest. A fire occurred and the mortgagee sued the insurance company. It was held that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when in point of fact his own insurable interest is that of a mortgagee, in case of a loss by fire before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use; and the Court in its opinion said:

> "But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration; let us examine it. Is it a double satisfaction for the same thing, the same debt or duty?
>
> The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt?
>
> He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the

mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

But the mortgagee, when he claims of the underwriters, does not claim the same debt, he claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that, upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration, (in other words, the computed chances of loss,) the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. He then pays the whole consideration, for a contract made without fraud or imposition; the terms are equal, and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party, upon a separate and distinct consideration paid by himself. The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insurance. A man gets $1,000 insured for $5, for one year, and the building is burnt within the year; he gets $1,000 for $5. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burnt in any one year, and the premium is equal to the chance of loss. But suppose—for in order to test a principle we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent, the creditor may pay a sum, equal to the whole debt, in permiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premiums paid.

What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received, in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent."

This statement of the Massachusetts court was dicta, but, nevertheless is pertinent for the purpose for which it is cited, namely, merely to show the principle upon which that line of cases based their decision. It is interesting to note in this connection that in the case of Kernochan v. The New York Bowery

Fire Ins. Co., 17 N. Y., 428, Judge Roosevelt in his opinion, joining in an affirmance, after citing and quoting from this Massachusetts case, referred to the view as follows:

> "This view, however, it will be seen, ignores the principle of public policy that no man should be allowed to bargain for an advantage to arise from the destruction of life or property, in other words, to lay a wager that a particular person will die or a particular property be burnt within a given period. We regard the contract of insurance as one purely of indemnity. Should it be said that insurance companies will receive premiums without a corresponding risk, the answer is that such suggestion may be safely left to the interest of the parties, who will soon adjust their premiums to the diminished losses."

There is much to be said as to both of these views. On one side, it is the contention that public policy ought not to permit a party to be twice reimbursed for property destroyed by fire, and thus to be a gainer because of the destruction of property; on the other side is the strict legal enforcement of contract rights unaffected by this claim as to public policy.

Perhaps, the best way to eliminate this question would be for the standard forms of policies to contain some clause which would cover the situation, so that both parties to the insurance contract would contract with the intention that there should be but one reimbursement.

Frequently questions connected with the right of subrogation arise between a mortgagor and his mortgagee and an insurer which has insured the property for both or for one of them. There are certain well established principles governing most of these questions, some of which are as follows:

When a mortgagee independently of the owner and mortgagor takes out insurance upon his own interest, and at his own expense, and for his sole benefit, the insurer upon payment of the loss to him is entitled to subrogation.

Excelsior Ins. Co. v. Royal Ins. Co., 55 N. Y. 543.

And this is also true under such circumstances when the mortgagee obtains the policy in form to the owner and mortgagor, but with loss payable to him (the mortgagee).

This right of subrogation does not depend upon the contract.

Thompson v. Montauk Ins. Co., 43 Hun., 218.

In some states, for instance, Massachusetts, it was held the insurer could not have subrogation to the rights of a mortgagee

as against the mortgagor, unless the policy in terms provided for it.

Suffolk Ins. Co. v. Boyden, 9 Allen, 123.

The Form of Policy now used in Massachusetts contains a provision which makes it possible for the insured to take steps which will secure it the benefit of subrogation against the mortgagor.

If the insurer issues a policy to the owner with the loss merely made payable to the mortgagee, without a mortgagee clause, the latter is only an appointee to receive the loss (if any due) to the owner with whom the contract is exclusively made. (Moore v. Hanover Ins. Co., 141 N. Y. 219), and there can be no subrogation on payment to the mortgagee.

Cohen v. Niagara Fire Ins. Co., 60 N. Y. 619.

When the policy insures the owner and mortgagor and provides that the loss be paid to the mortgagee, with mortgagee clause attached, and the insurance is void as to the owner, upon paying the loss to the mortgagee, the insurer is entitled to subrogation and as assignee of the mortgage, may foreclose it.

Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389;
Hastings v. Westchester Ins. Co., 73 N. Y. 141.

Where the insurance is void as to the owner as against the mortgagee under the mortgagee clause, the insurance company cannot claim that the right of subrogation has been impaired or lost by a foreclosure and sale, and that, therefore, he cannot recover for the loss. If foreclosure proceedings are pending at the time of fire, the insurer should take active steps and protect its interest, if any, by paying the mortgage debt and taking an assignment or otherwise.

Eddy v. London Assur. Co., 143 N. Y. 311.

Until payment is made by the insurer, the mortgagee is free to make any settlement he wishes with other insurers, and if any insurer desires to avail itself of its right of subrogation under the terms of a mortgagee clause, and to acquire an interest in the mortgage so as to be able to dictate settlement with other insurers, it must first pay the amount due from it on account of the loss.

New Hampshire Ins. Co. v. National Life Ins. Co., 112 Fed. Rep. 199.

When the insurance is not sufficient to cover the mortgage debt, the insurer takes nothing by subrogation and assignment

until the mortgage is paid or tendered in full, both as to principal and interest.

Phœnix Ins. v. First National Bank, 85 Va. 765; Gibb v. Philadelphia Ins. Co., 59 Minn. 267.

If an insurer has, under a mortgagee clause, paid the mortgage in full and taken an assignment, upon foreclosure of the mortgage it need only credit upon the mortgage as against a previous owner liable for any deficiency, the portion of the loss for which it was originally liable to the owner at the time of the fire, under the apportionment clause of the policy.

Phœnix Ins. Co. v. Floyd, 19 Hun. 287; affd. without opinion, 83 N. Y. 613.

Questions relating to subrogation also sometimes arise in connection with the rights of a vendee or vendor.

If a vendee under an executory contract of sale agrees to pay the expense of insurance by the vendor, and does so, the insurance exists for his benefit, and the insurer has no right of subrogation to the claim of the vendor on payment of a loss to him.

Wood v. Northwestern Ins. Co., 46 N. Y. 421.

This, however, may be otherwise when, as between the vendor and vendee, the latter is not entitled to any benefit from the insurance.

Clinton v. Hope Ins. Co., 45 N. Y. 454.

When the vendee is discharged from liability to the vendor by occurrance of the fire, or when as between them, the vendee is entitled to the benefit of the insurance in event of loss, there can be no subrogation.

Clinton v. Hope Ins. Co., supra; See Lett v. Guardian Trust Co., 52 Hun. 570.

In the practical administration of insurance business as regards subrogation, perhaps one of the most important subjects to be considered is that of waiver, that is waiver of their respective rights by both the insured and the insurer.

The insurer's right of subrogation does not accrue until after loss has occurred. On payment of the loss the insured becomes a trustee for the insurer and cannot afterwards settle or compromise his claim against others liable for the loss to the insurer's prejudice.

If the insured settles with the party primarily liable and gives an absolute release of all his claims against such party without excepting the insurance, thus destroying the insurer's right of

subrogation in case it should make payment of the loss, it is a good defense to an action brought by the assured against the insurer.

Dilling v. Draemel, 9 N. Y. Supp. 497; Sims v. Mutual F. Ins. Co., 101 Wis. 586; Highlands v. Cumberland Valley Farmers' Mutual Life Ins. Co., 203 Pa. 134.

But if the release is not an absolute one and includes only such losses as are not covered by the insurance, it will not affect the assured's remedy against the insurer since the latter upon payment of the insurance will still retain its right of action against the party primarily liable.

Insurance Co. of N. A. v. Fidelity Title & T. Co., 123 Pa. 523.

If the assured gives a release to the party primarily liable in which it is expressly stipulated that it is not to affect the claim of the assured against the insurer for the loss covered by the insurance, thus making the settlement include only the loss not covered by insurance, it will not affect the insurer's right of action upon his policy.

Insurance Co. of N. A. v. Fidelity Title & T. Co. 123 Pa. 523.

If the third person is primarily liable only for a portion of the loss covered by the policy a release will operate to the benefit of the Insurance Company only to the extent to which the third person might have been held for loss for which the Company is also liable. Svea Assurance Co. v. Packham, 92 Md. 464.

Where a mortgagee has by any agreement or act destroyed any right of the insurer to be subrogated to the rights of the mortgagee, he thereby releases the insurer from liability.

Lett v. Guardian Ins. Co. 52 Hun, 570; Affd. 125 N. Y. 582.

If the assured receive damages from a party primarily liable before collecting his insurance, the amount so received would be applied pro tanto in discharge of the policy.

Conn. Fire Ins. Co. v. Erie Rwy. Co., 73 N. Y. 399;

If the assured collects damages from the party primarily liable after he has been paid in full for his loss by the insurer, he must account therefor to the insurer, or if after being paid in full by the party primarily liable, he conceals the fact and collects from the insurer, the insurer may recover back so much

of the amount so paid as exceeds the assured's actual loss after deducting the amount received by him from the party primarily liable upon the ground that it was fraudulently obtained.

If the insurer voluntarily pays the loss with full knowledge that the assured has recovered his full loss from the party primarily liable, it cannot maintain an action against the assured to recover back.

Conn. Mut. Life Ins. Co. v. Erie Rwy. Co. 73 N. Y. 399.

If the party primarily liable pays the assured after payment by the insurer, with knowledge of that fact, it is a fraud upon the latter and will not protect such party from liability to the insurer.

Conn. Mut. Life Ins. Co. v. Erie Rwy. Co., 73 N. Y. 399; 19 Cyc. 895, and cases cited.

A decision of considerable interest is found in the case of Fire Association of Philadelphia v. Schellenger, 95 Atlantic Rep. 615 (N. J.) decided June 14th, 1915. In that case, the plaintiff issued a policy of insurance for $3,000 on the property of the defendant. The policy contained the same provision as to subrogation as is found in the New York standard policy, and it is presumable that the policy was on such a form. The plaintiff paid to Schellenger, under its policy, $2855, the agreed amount of its liability. Subsequently, Schellenger brought an action against the Atlantic City Railway Company, claiming that the fire by which his property was injured, was caused by sparks negligently permitted to escape from an engine of that company. He recovered a verdict which was finally compromised at $3,000 and paid by the Company, and a general release was given by Schellenger. Then the plaintiff brought an action against Schellenger, claiming that it had a right of subrogation to receive, out of the amount recovered by Schellenger against the Railroad, reimbursement of the moneys it had paid Schellenger under the policy. The plaintiff Insurance Company, made no claim for subrogation until it commenced its action against Schellenger, after Schellenger had recovered from the Railroad Company.

The Court of Errors and Appeals to which the case was appealed, held that the plaintiff could not recover on the ground that it failed to assert its claim to subrogation at or before the time when it made payment, under its policy, to Schellenger. The Court, in its opinion, said:

"Its failure to assert such claim at or before the time when the payment was made was a failure to comply with

> the condition upon which its right to subrogation depended, and terminated the existence of that right, leaving the defendant free to so deal with the person responsible for the fire, with relation to a settlement of any claim against such person, as he might see fit, without any liability to be called to account by the complainant for any of the proceeds of such settlement."

It is interesting to note that the Court held that if there had been no provision in the policy relating to subrogation, the plaintiff could have recovered under its common law right to be subrogated, but that having made a contract containing the provision which it did, and which provided that "This company shall on payment of the loss, be subrogated, &c" and "Such right shall be assigned to this company by the insured on receiving such payment," its common law right of subrogation was waived, and therefore when it failed to comply with the provisions of the contract as to asserting its claim at the time of payment, it had no ground for recovery. Under this decision, the provision contained in the standard policy, to say the least, was not very advantageous to the Insurance Company. The importance of the decision, however, rests in the fact that it holds that the Company should, and, in fact, must assert its claim or right to be subrogated at or before the time it makes a payment to the insured under its policy. There is considerable doubt whether this decision will receive very general approval in the courts. If during the time that the insurance company delayed in claiming its right of subrogation, the position of any of the parties had been changed so that they might suffer by reason of the delay in claiming the right, it would be another question and perhaps then the company might be properly held to have lost its right to be subrogated.

I have called attention to some of the rules and principles of subrogation, and endeavored to show how they are sometimes applied under the law of fire insurance.

As was well stated by the Court in the case of Eaton v. Hasty (6 Neb. 419), in referring to subrogation: "No general rule can be laid down which will afford a test in all cases for its application, and whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."

The nature and grounds of subrogation are clear. The difficulties arise in its application. The Courts are inclined, however, rather to extend than to restrict the principle.

PRINTED JANUARY, 1916

MSH 20559.

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